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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 FATIMA BINETA LO,

12 Petitioner,

13 v.

14 NEW JERSEY IMMIGRATION COURT,

15 Respondent.  
16  
17

Civil No. 13-0648 LAB (BLM)

**ORDER:**

**(1) DENYING IN FORMA PAUPERIS  
APPLICATION AND**

**(2) DISMISSING CASE WITHOUT  
PREJUDICE**

18 Petitioner, a detainee in the custody of the Department of Homeland Security, Bureau of  
19 Immigration and Customs Enforcement, proceeding pro se, filed a Petition for Writ of Habeas  
20 Corpus pursuant to 28 U.S.C. § 2254, along with a Motion for Leave to Proceed In Forma  
21 Pauperis. [ECF Nos. 1,2.]

22 **FAILURE TO STATE COGNIZABLE 28 U.S. C. § 2254 CLAIM**

23 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
24 federal habeas corpus claims:

25 The Supreme Court, a Justice thereof, a circuit judge, or a district  
26 court shall entertain an application for a writ of habeas corpus in  
27 behalf of a person in custody pursuant to the judgment of a State  
28 court only on the ground that he is in custody in violation of the  
Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

Although Petitioner filed this action pursuant to 28 U.S.C. §2254, Petitioner does not challenge a state court conviction within her Petition. Section 2254 is properly understood as “in effect implement[ing] the general grant of habeas corpus authority found in § 2241 as long as the person is in custody pursuant to the *judgment* of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction.” [citations omitted.] Id. at 1006 (quoting Walker v. O’Brien, 216 F.3d 626, 633 (7th Cir. 2000) (emphasis in original)). “By contrast, the general grant of habeas authority in § 2241 is available for challenges by a state prisoner who is not in custody pursuant to a state court judgment—for example, a defendant in pre-trial detention or awaiting extradition. In these situations, not covered by the limitations in § 2254, the general grant of habeas authority provided by the Constitution and § 2241 will provide jurisdiction for state prisoners' habeas claims.” Id. at 1006 (citing McNeely v. Blanas, 336 F.3d 822 (9th Cir.2003) (allowing a pre-trial detainee to proceed under § 2241)).

Based on the current Petition, it appears the only potential habeas relief available to Petitioner would be the general habeas relief set forth in 28 U.S.C. §2241.<sup>1</sup>

### **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

To the extent Petitioner is raising a challenge under 28 U.S.C. § 2254, the request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner’s financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer

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<sup>1</sup>Petitioner currently has a petition pending in this Court pursuant to 28 U.S.C. §2241 in case number 13cv0647 JLS (BGS).

1 showing the amount of money or securities Petitioner has on account in the institution.  
 2 Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to provide the Court  
 3 with the required Prison Certificate.

#### 4 **FAILURE TO NAME PROPER RESPONDENT**

5 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On  
 6 federal habeas, a state prisoner must name the state officer having custody of him as the  
 7 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28  
 8 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to  
 9 name a proper respondent. See id.

10 The warden is the typical respondent. However, “the rules following section 2254 do not  
 11 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the  
 12 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
 13 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
 14 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall  
 15 be the state officer who has official custody of the petitioner (for example, the warden of the  
 16 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

17 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
 18 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
 19 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.  
 20 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
 21 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
 22 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
 23 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d  
 24 at 895.

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27 Here, Petitioner has incorrectly named “New Jersey Immigration Court,” as Respondent.  
 28 In order for this Court to entertain the Petition filed in this action, Petitioner must name the

warden in charge of the state correctional facility in which Petitioner is presently confined or the Director of the California Department of Corrections. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

#### **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

Nowhere on the Petition does Petitioner allege that she raised her claims in the California Supreme Court. In fact, she specifically indicates she did not seek review in the California Supreme Court. (See Pet. at 6-9.) If Petitioner has raised her claims in the California Supreme Court she must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ

of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because she has not alleged exhaustion of state court remedies.

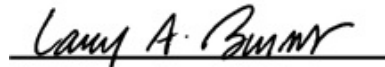
### **CONCLUSION AND ORDER**

Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice for Petitioner’s failure to name state a cognizable habeas claim, name a proper respondent, and allege exhaustion of state court remedies. If

1 Petitioner wishes to proceed with this case under Section 2254, Petitioner must, **no later than**  
2 **June 11, 2013**, provide the Court with: (1) a copy of this Order together with the \$5.00 filing  
3 fee; or (2) a copy of this Order together with adequate proof that Petitioner cannot pay the \$5.00  
4 filing fee **AND** a First Amended Petition that remedies the pleading deficiencies noted above.  
5 *The Clerk of Court is directed to send Petitioner a blank Application to Proceed In Forma*  
6 *Pauperis, and a blank section 2254 First Amended Petition.*

7 **IT IS SO ORDERED.**

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9 DATED: April 11, 2013

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11 **HONORABLE LARRY ALAN BURNS**  
12 **United States District Judge**